

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

JUSTIN LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 214354

Cass Circuit Court

LC No. 97-009337

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). Defendant was sentenced to three years' probation, with the first year to be served in the county jail, for the possession with intent to deliver conviction and 229 days in jail, with credit for time served, for the possession of marijuana conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in failing to instruct the jury regarding the order of deliberation when the instruction for the lesser included offense of possession of cocaine was given for the jury's consideration. We disagree. This issue is not preserved for appeal because defendant did not object to the jury instructions given at trial. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). Failure to object to the jury instructions results in a waiver of appellate review absent manifest injustice. *Id.*

In *People v Handley*, 415 Mich 356, 357-358; 329 NW2d 710 (1982), the trial court instructed the jury regarding possible verdicts of first-degree murder, second-degree murder, and manslaughter. However, when instructing the jury, the trial court indicated that the jury must acquit the defendant of the first-degree murder charge prior to examining the other charges. On appeal, the Supreme Court held that a jury should be instructed to consider the principal charge first. If it fails to convict or acquit or is unable to agree whether to convict or acquit on the principal charge, then it may turn to lesser offenses. *Id.* The Supreme Court further held that this rule did not modify the requirement that an instructional error had to be objected to in order to be preserved for appellate review. Finally,

the Court noted that an instruction would not be deemed erroneous unless it conveyed the impression that there must be an acquittal on one charge before a lesser charge could be considered. *Id.*

In the present case, the trial court omitted the following paragraph from instruction CJI2d 3.11, which incorporated the *Handley* decision:

(5) In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [name principal charge] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [name principal charge] or if you cannot agree about that crime, you should consider the less serious crime of [name less serious charge]. [You decide how long to spend on (name principal charge) before discussing (name less serious charge). You can go back to (name principal charge) after discussing (name less serious charge) if you want to.]

However, review of the jury instructions in their entirety reveals that an error requiring reversal did not occur. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). The trial court never conveyed to the jury that it must acquit defendant of the possession with intent to deliver less than fifty grams of cocaine charge prior to examining the lesser included offense of possession of cocaine. *Handley, supra*. Furthermore, manifest injustice from an omitted instruction only occurs where the omission pertained to a basic and controlling issue. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Jury instructions must not omit material issues, defenses and theories if the evidence supports them. *Id.* In the present case, the omitted paragraph did not relate to an issue, defense, or theory at trial. Rather, the instruction merely related to the order of deliberation of the lesser included offense, and the instruction as given did not indicate that the jury had to acquit defendant of the principal charge first. *Handley, supra*. Accordingly, defendant's argument is without merit.

Defendant next argues that the trial court erred in failing to grant his motion for a directed verdict where there was insufficient evidence of possession. We disagree. Our review of the trial court's denial of a motion for a directed verdict is limited to the evidence presented by the prosecutor up to the time that the motion was made. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). We examine this evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 616. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *Id.*

In order to establish the crime of possession with intent to deliver less than fifty grams of cocaine, the prosecutor must prove that the defendant knowingly possessed the cocaine with the intent to deliver. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). The offense of possession of marijuana merely requires proof that defendant had possession of the controlled substance. *People v Hellenthal*, 186 Mich App 484, 486; 465 NW2d 329 (1990). Possession may be actual or constructive, and the key inquiry is whether the defendant had dominion or control over the controlled substance. *Griffin, supra*. Although the drugs seized were not found on defendant's

person, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. *Id.* at 35. Several facts linked the crack cocaine and marijuana to defendant. Officer Jared Ostrom testified that the bag containing the drugs was stuffed through a crack in the backseat of the vehicle where defendant had been seated. The bag was not completely hidden because an inch or two of the bag was sticking out of the crack. When asked to provide his name, defendant lied and gave a false name to the police. The driver of the vehicle, Cheryl Frazier, testified that the drugs did not belong to her, that she did not have anyone else in her vehicle on that date, and that she retained control of her vehicle by not loaning it to other persons. The other two occupants of the vehicle, Laquita Smith and Carlos Kirkland, testified that the drugs did not belong to them. Kirkland testified that he did not know if the drugs belonged to defendant. While mere proximity to drugs is insufficient to establish possession, the circumstantial evidence, taken in the light most favorable to the prosecution, was sufficient to establish defendant's possession of the drugs. *Griffin, supra*. The trial court properly denied defendant's motion for a directed verdict.

Defendant next argues that he was denied the effective assistance of counsel where trial counsel failed to object to the omitted jury instruction, failed to request a mere presence instruction, failed to object to improper questioning by the prosecutor, and failed to object to an improper civic duty argument. We disagree. A reversal based on ineffective assistance of counsel will not occur unless a defendant demonstrates that counsel's performance fell below an objective standard of reasonableness and the resulting prejudice deprived him of a fair trial. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). Effective assistance is presumed and a defendant bears a heavy burden of proving otherwise. *Id.* Furthermore, a defendant must demonstrate actual prejudice, that is, there must be a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* Because an evidentiary hearing was not held regarding this issue below, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant's argument, that trial counsel was ineffective for failing to object to the omission of the order of deliberation instruction, is without merit. The instruction as given was proper despite the omission. *Handley, supra*. Defendant also argues that trial counsel's failure to request the mere presence instruction also rendered him ineffective. We disagree. CJI2d 8.5, the mere presence instruction, applies where a defendant is charged with an aiding and abetting crime. In the present case, defendant was not charged under an aider and abetter theory. Even if trial counsel had requested the instruction, the trial court is only required to give instructions which are supported by the evidence or facts of the case. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). Accordingly, defendant's argument is without merit.

Defendant's argument, that trial counsel was ineffective for failing to object to improper questioning by the prosecutor, is also without merit. A witness may be examined regarding prior statements. MRE 613. Lastly, we reject defendant's contention that trial counsel was ineffective for failing to object to an improper civic duty argument. While the prosecutor's comment in

closing argument was unwarranted and unnecessary, it did not deprive defendant of a fair trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff